2009

Cooper Enterprises v. Deseret Sky Development : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

COOPER ENTERPRISES, P.C., a Utah Professional Corporation,
Plaintiff/Appellee,
vs.

DESERET SKY DEVELOPMENT, LLC, a Utah Limited Liability Company,
Defendant,

Case No. 20090209-CA

BRIGHTON TITLE COMPANY, LLC, a Utah Limited Liability Company,
Defendant/Appellant; and
DOES 1 - 10,

Defendants.

BRIEF OF APPELLEE

Appeal of the Judgment and Order of the Honorable Sandra N. Peuler
Third Judicial District Court, Salt Lake Department

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STATEMENT OF JURISDICTION

This court has appellate jurisdiction pursuant to Utah Code § 78A-4-103.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

APPELLEE'S ISSUE NO. 1 (See Appellant's Issue No. 1): Did the district court grant Plaintiff's Motion for Summary Judgment on the basis that Defendant Brighton Title failed to comply with Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure? "The proper interpretation of a rule of procedure is a question of law, and we review the trial court's decision for correctness." Kotter v. Kotter, 206 P.3d 633, ¶ 9 (Utah.App., 2009) 2009 UT App 60; In re A.M., 208 P.3d 1058, ¶ 9 (Utah Ct. App. 2009), 2009 UT App 118; Ostler v. Buhler, 989 P.2d 1073, ¶ 5 (Utah 1999), 1999 UT 99. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf v. Pleasant Grove City, 173 P.3d 166, ¶ 5 (Utah 2007), 2007 UT 84, Blackner v. State, 48 P.3d 949, ¶ 8 (Utah 2002), 2002 UT 44. This issue was preserved. (R 712-729).

APPELLEE'S ISSUE NO. 2 (See Appellant's Issues Nos. 2 and 13): Did the district court rule correctly that Cooper was entitled to judgment against Brighton Title as a matter of law and that no genuine issues of material fact existed precluding summary judgment? "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8. The appellate court reviews the facts in the light most favorable to the nonmoving party and makes any reasonable inferences in its favor. Johnson v. Hermes Assocs., 128 P.3d 1151, at ¶ 2 (Utah 2005) 2005 UT 82. This issue was preserved. (R 469-577).

APPELLEE'S ISSUE NO. 3 (See Appellant's Issue Nos. 3 and 7): Did the district court fail to provide analysis or reasoning explaining the basis for granting Cooper summary judgment, and if so, did the district court err as a matter of law and abuse its discretion in so doing? "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8. This issue was preserved. (R 727). Additionally, did the district court err as a matter of law in signing the ruling prepared by counsel for Cooper. (See Appellant's Issue No. 7)? Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 2009 UT App 118, at ¶ 9; Ostler, 989 P.2d 1073, at ¶ 5. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8. This issue was preserved. (R 742- 45).

APPELLEE'S ISSUE NO. 4 (See Appellant's Issue No. 5): Did the district court err as a matter of law in concluding Brighton Title owed any fiduciary duty to Cooper? Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 208 P.3d 1058, at ¶ 9; Ostler, 989 P.2d 1073 at ¶ 5. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf , 173 P.3d 166, ¶ 5 Blackner, 48 P.3d 949, ¶ 8. This issue was preserved. (R 482-83).

APPELLEE'S ISSUE NO. 5 (See Appellant's Issues Nos. 6, 11 and 12): Did the district court err in concluding the Utah Department of Insurance Bulletin did not have the force of law and cannot be used to excuse Brighton Title's conduct? Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 208 P.3d 1058, at ¶ 9; Ostler, 989 P.2d 1073, at ¶ 5. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no

deference." Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8. This issue was preserved (R 480-82).[1]

APPELLEE'S ISSUE NO. 6 (See Appellant's Issue No. 8): Did the district court correctly rule Brighton Title did not have an interest sufficient to challenge an award of attorney fees against Defendant Deseret Sky Development, LLC, where the district court did not enter that

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[1] Appellee's Issue No. 6 is related to Appellant's Issue No. 11, and with regard to Appellant's Issue No. 11, OBJECTION AS TO APPELLANT'S ISSUE NO. 11. Appellant's Issue No. 11, is articulated by the Appellant as follows:

> Issue No. 11: Did the district court err as a matter of law in concluding Brighton Title breached its duties to Cooper where the transaction was an illegal flip? This issue presents a question of law which is reviewed *de novo*. Savage v. Utah Youth Vill., 2004 UT 102,1117, 104 P.3d 1242. This issue was preserved. (R 480-81).

Appellant's Issue No. 11 begs the question by presuming conclusions of law, i.e., "[T]he transaction was an illegal flip." Appellee articulates the Appellant's Issue No. 11 as follows: Was the transaction underlying the real estate purchase contract in question illegal, excusing Brighton Title's breach of its duties to Cooper as escrow agent for the transaction underlying the real estate purchase contract in question? Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 208 P.3d 1058, at ¶ 9; Ostler, ¶ 5, 989 P.2d 1073. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5; Blackner, 48 P.3d 949, at ¶ 8. This issue was preserved. (R 480-81). Appellant's Issue No. 11 is related to Appellant's Issue No. 12, and with regard to Issue No. 12, OBJECTION AS TO APPELLANT'S ISSUE NO. 12. Appellant's Issue No. 12, is articulated by the Appellant as follows:

> Issue No. 12: Did the district court err as a matter of law in ruling a title company may act as an escrow agent where they are unable to insure the transaction because one of the parties' [sic] is not on title to the property? This issue presents a question of law which is reviewed *de novo*. Savage v. Utah Youth Vill., 2004 UT 102, ¶ 17, 104 P.3d 1242. This issue was preserved. (R 483).

Appellant's Issue No. 12 begs the question by presuming facts not established and/or presuming conclusions of law, i.e., "[Brighton Title was] unable to insure the transaction because one of the parties' [sic] is not on title to the property." Appellee articulates the Appellant's Issue No. 12 as follows: If Brighton Title was unable to insure the transaction because one of the parties is not on title to the property, is Brighton Title excused from its duties as an escrow agent for the transaction? "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5; Blackner, 48 P.3d 949, at ¶ 8.

attorney's fee award against Brighton Title? The trial court's determination of the legal requirements for standing are reviewed for correctness. D.U. Co., Inc. v. Jenkins, --- P.3d ----, 2009, ¶ 11 (Utah Ct. App. 2009), 2009 UT App 195; Jones v. Barlow, 154 P.3d 808, ¶¶ 10-11 (Utah 2007), 2007 UT 20. This issue was preserved (R 769).

APPELLEE'S ISSUE NO. 7 (See Appellant's Issue No. 10): Did the district court err as a matter of law in concluding the seller of real property did not have to hold fee title at all times during the executory period of the real estate purchase contract? Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 208 P.3d 1058, at ¶ 9; Ostler, 989 P.2d 1073, at ¶ 5. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8. This issue was preserved. (R 478-80).

OBJECTION AS TO APPELLANT'S ISSUE NO. 4. THIS IS ISSUE IS RAISED FOR THE FIRST TIME ON APPEAL. Appellant's Issue No. 4 is articulated by the Appellants as follows:

> Issue No. 4: Did the district court err as a matter of law in concluding Brighton Title was bound by the terms of a real estate purchase contract to which it was not a party? This issue presents a question of law that is reviewed *de novo*. Savage v. Utah Youth Vill., 104 P.3d 1242 (Utah 2004), 2004 UT 102. This issue was preserved. (R 483-85).

There is no record of this issue having been raised by Brighton Title, nor is there record of Brighton Title having preserved such an issue for appeal. Brighton ostensibly provides record citations in support of its claim that it preserved its contract defense, but those citations neither raise nor preserve the question of whether Brighton Title was a party to the contract. Accordingly, the appellate court should not address that issue (Firkins v. Ruegner, --- P.3d ----, 2009 WL 1803243 (Utah App.), 2009 UT App 167, n.5 (citing Ong Int'l (U.S.A.) Inc. v. 11th

Ave. Corp., 850 P.2d 447, 455 (Utah 1993) (citing Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412, 413 (Utah 1990) (citing Pratt v. City Council, 639 P.2d 172, 173-74 (Utah 1981) ("With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal.") (internal quotation marks omitted)).

OBJECTION AS TO APPELLANT'S ISSUE NO. 9. Appellant's Issue No. 9, is articulated by the Appellant as follows:

> Issue No. 9: Did the district court correctly conclude Brighton Title breached its contractual obligations to Cooper where Cooper first breached the contract by representing it was the fee title owner of the property when it was not? This issue presents a question of law that is reviewed *de novo*. Savage v. Utah Youth Vill., 2004 UT 102, 1117, 104 P.3d 1242. This issue was preserved. (R 478-80).

Appellant's Issue No. 9 begs the question by presuming facts not established, i.e., "Cooper first breached the contract." Appellee articulates Appellant's Issue No. 9 as follows: Did Cooper breach the real estate purchase contract underlying the instant action by representing it was the fee title owner of the property? Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 208 P.3d 1058, at ¶ 9; Ostler, 989 P.2d 1073, at ¶ 5. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference" (Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8), and if Cooper first breached the contract by representing it was the fee title owner of the property when it was not, did the district court correctly conclude Brighton Title nevertheless breached its contractual obligations to Cooper? This issue was preserved. (R 478-80). Kotter, 206 P.3d 633, at ¶ 9; In re A.M., 208 P.3d 1058, at ¶ 9; Ostler, 989 P.2d 1073, at ¶ 5. "When reviewing a grant of summary judgment, we review the district court's conclusions of law for correctness and give them no deference." Grappendorf, 173 P.3d 166, at ¶ 5 Blackner, 48 P.3d 949, at ¶ 8. (R 478-80).

UTAH CODE SECTION WHOSE INTERPRETATION IS DETERMINATIVE OF THE APPEAL OR OF CENTRAL IMPORTANCE TO THE APPEAL

Utah Code § 31A-23a-406 – this code section is fully cited in the Addendum to Appellant's Brief.

STATEMENT OF THE CASE

This is a matter of claims Appellee Cooper Enterprises, P.C. ("Cooper") made, as Seller, against Deseret Sky Development, LLC ("Deseret Sky"), as Purchaser, and against the Appellant Brighton Title Company, LLC ("Brighton Title"), as escrow holder, respecting claims for liquidated damages, costs and attorney's fees, as provided in a Real Estate Purchase Contract for Land ("REPC").

The case comes before the Utah Court of Appeals following the district court granting Cooper's Motion for Summary Judgment against Defendants Deseret Sky and Brighton Title. (Deseret Sky did not oppose Cooper's Motion for Summary Judgment.)

STATEMENT OF THE FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Brighton Title does not dispute any of the following statements of fact made by the moving party on Plaintiff's motion for summary judgment (R 471-477; 578-584):

1. Cooper Enterprises, P.C. ("Cooper"), is a Utah professional corporation in good standing, doing business in Salt Lake County, State of Utah (Affidavit of Robert T. Cooper, Jr. ("Cooper Affidavit"), ¶ 3 (R 198); Complaint, ¶ 1 (R 1); Answer of Brighton Title, ¶ 1 (R 32); Counterclaim of Deseret Sky, ¶ C (R 51)).

2. Deseret Sky Development, L.L.C. ("Deseret Sky"), is a Utah limited liability company in good standing, doing business in Salt Lake County, State of Utah (Complaint, ¶ 2 (R 1); Answer of Brighton Title, ¶ 2 (R 32); Answer of Deseret Sky, ¶ 2 (R 44)).

3. Brighton Title Company, L.L.C., is a Utah limited Liability company in good standing, doing business in Salt Lake County, State of Utah (Complaint, ¶ 3 (R 2); Answer of Brighton Title, ¶ 3 (R 32); Answer of Deseret Sky, ¶ 3 (R 44)).

4. The real property which is the subject hereof is located in Salt Lake County, State of Utah, and known generally as Danish Heights Estates PUD or 2745 East Creek Road, Cottonwood Heights, Salt Lake County, Utah (the "Real Property") (Complaint, ¶ 5 (R 2); Answer of Brighton Title, ¶ 5 (R 33); Answer of Deseret Sky, ¶ 5 (R 44)).

5. By Real Estate Purchase Contract for Land, with offer reference date of May 25, 2007, as modified by Addendum Nos. 1, 2 and 3 (the "REPC"), Cooper agreed to sell, and Deseret Sky agreed to buy the Real Property (Cooper Affidavit, ¶ 4 (R 198); Complaint, ¶ 6 (R 2); Answer of Deseret Sky, ¶ 6 (R 44)).

6. At the time the REPC was entered into, Cooper had a contractual right to purchase the Real Property (Cooper Affidavit, ¶ 6 (R 199-200)).

7. Angela Gowans was at all relevant times a real estate agent employed by Great American Properties, whose principal broker is Wes Williams (Deposition of Angela Gowans, dated April 29, 2008 (hereinafter referred to as "Gowans Depo."), Pg. 6, lines 12-19 (R 257)).

8. At all relevant times, Angela Gowans was Deseret Sky's agent for purposes of the REPC (Deposition of Angela Gowans, Deposition Exhibit 3 (R 280-289)). All depositions taken in this case have used the same set of exhibits and are hereinafter referred to as "Depo. Ex. _____").

9. On May 27, 2007, Ms. Gowans received from Cooper a conditional use application, preliminary plat submittal which included all applications, title, and geotechnical information, drawings and engineering information, along with the Cottonwood Heights

Preliminary Plat Approval, Application Acceptance Letter, Fencing Proposal, Permit Report, correspondence with Cottonwood Heights City, sellers disclosures, and minutes from the Cottonwood Heights Improvement District pertaining to the Real Property also known as Danish Heights project (Gowans Depo., Pg. 24, lines 4–25 (R 258); Pg. 25, lines 1–3 and 13-16 (R 259); Pg. 28, lines 9-25 (R 259); Pg. 29, lines 1-5 (R 260); Pg. 29, lines 14-25 (R 260); Pg. 30, lines 1-11 (R 260); Depo. Ex. 4 (R 291-293); Depo. Ex. 5 (R 295-343); Depo. Ex. 6 (R 345-413)).

10. On or about June 1, 2007, Ms. Gowans received from Cooper the Hansen Contract (showing Cooper Enterprises' contract interest for purchase of the Real Property) (Gowans Depo., Pg. 36, lines 1–15 (R 261); Depo. Ex. 8 (R 415-427)).

11. Angela Gowans had "a dozen" conversations with Deseret Sky representatives and representatives of Brighton Title Company, L.L.C. ("Brighton Title") in subsequent days respecting the subject of the materials Cooper provided and the fact that Cooper Enterprises, P.C. did not hold fee title to the Real Property (Gowans Depo., Pg. 27, lines 15-25 (R 259); Pg. 28, lines 5–6 (R 259); Pg. 35, lines 15-25 (R 261); Pg. 36, lines 22-25 (R 261); Pg. 37, lines 1-9 (R 262)).

12. Additionally, on May 31, 2007, Brighton Title was aware that Cooper did not hold fee title to the Real Property (Deposition of Jeffrey Gorringe, Brighton Title's Rule 30(b)(6) witness, taken April 30, 2008 (hereinafter "Gorringe Depo."), Pg. 17, lines 12-24 (R 268)).

13. The next day (June 1, 2007), Brighton Title so informed Deseret Sky (Gorringe Depo., Pg. 18, lines 10-12 (R 268)).

14. The REPC, paragraph 2(a) reflected an initial earnest money deposit of One Hundred Thousand Dollars ($100,000.00), and provided: "THIS DEPOSIT MAY BECOME TOTALLY NON-REFUNDABLE" (REPC, Depo. Ex. 3 (R 280-289)).

15. Paragraph 2 of Addendum No. 1 to the REPC provides:

2) Earnest Money to be $100,000 deposited w/ Brighton Title Company upon acceptance. An additional $100,000 earnest money to be deposited with Brighton Title Company after Buyer's Due Diligence deadline. Total of $200,000 shall [be] non-refundable after June 8, 2007 REPC, Depo. Ex. 3 (R 280-289).

16. Addendum No. 2 to the REPC provides:

1. REPC, Section 2(d) $100,000 additional earnest money due on June 8, 2007 by 5:00 PM MDT. . .

* * *

6. [sic] $100,000 Earnest Money to be non-refundable but applicable and immediately released to Seller on June 8, 2007 at 5:00 pm MDT.

6. An additional $100,000 Earnest Money will be deposited on June 8, 2007 by 5:00 pm MDT which is non-refundable but applicable and immediately released to Seller on June 8, 2007 at 5:00 pm MDT.

17. Addendum No. 3 provides:

4) All earnest monies shall be deposited with Brighton Title initially and shall be released to Metro National Title on June 8, 2007 at 5:00 pm MST REPC, Depo. Ex. 3 (R 280-289).

Under the terms of the REPC, $100,000 was deposited with Brighton Title, as also evidenced by letter of receipt by Brighton Title ("Letter Receipt"), dated June 5, 2007, over the signature of Jeff Gorringe (Gorringe Depo., Pg. 21, lines 2-16 (R 269); Pg. 28, lines 17-23 (R 270); Pg. 29, lines 1-9 (R 271); Depo. Ex. 11 (R 429)).

18. Brighton Title accepted the initial $100,000 earnest money from Deseret Sky in escrow, in its capacity as an escrow agent (Gorringe Depo., Pg. 21, lines 2-25 through Pg. 22, lines 1-16 (R 269); Pg. 25, lines 5-10 (R 270)).

19. Paragraph 8 of the REPC provides:

8. BUYER'S RIGHT TO CANCEL BASED ON BUYER'S DUE DILIGENCE. Buyer's obligation to purchase under this Contract (check applicable boxes):

(a) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the content of all the Seller Disclosures referenced in Section 7;

(b) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a physical condition inspection of the Property;

(c) [X] IS [ ] IS NOT conditioned upon Buyer's approval of a survey of the Property by a licensed surveyor;

(d) [X] IS [ ] IS NOT conditioned upon Buyer's approval of applicable federal, state and local governmental laws, ordinances and regulations affecting the Property; and any applicable deed restrictions and/or CC&R's (covenants, conditions and restrictions) affecting the Property;

(e) [X] IS [ ] IS NOT conditioned upon the Property appraising for not less than the Purchase Price;

(f) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the terms and conditions of any mortgage financing referenced in Section 2 above;

(g) [X] IS [ ] IS NOT conditioned upon Buyer's approval of the following tests and evaluations of the Property: (specify) Any additional deemed necessary by Buyer.

If any of items 8(a) through 8(g) are checked in the affirmative, then Sections 8.1, 8.2, 8.3 and 8.4 apply; otherwise, they do not apply. The items checked in the affirmative above are collectively referred to as Buyer's "Due Diligence.". . . (REPC, Depo. Ex. 3 (R 280-289))

20. Paragraph 8.1 of the REPC provides:

Due Diligence Deadline. No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer (REPC, Depo. Ex. 3 (R 280-289)).

21. In accordance with the REPC, the earnest monies ($200,000 total) become non-refundable on June 8, 2007, unless the REPC was timely cancelled by Deseret Sky. In that regard, the REPC provides:

8.2 Right to Cancel or Object. If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.

8.3 Failure to Respond. If by the expiration of the Due Diligence Deadline, Buyer does not (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, the Buyer's Due Diligence shall be deemed approved by Buyer and the contingencies

referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer. (REPC, Depo. Ex. 3 (R 280-289))

22. Paragraph 24 of the REPC provided for a Due Diligence Deadline of June 8, 2007 (REPC, Depo. Ex. 3 (R 280-289)).

23. The REPC provides, in paragraph 16:

16. DEFAULT. If Buyer defaults, Seller may elect to . . . retain the Earnest Money Deposit as liquidated damages. . . . (REPC Depo. Ex. 3 (R 280-289))

24. The REPC provides, in paragraph 17:

17. ATTORNEYS FEES AND COSTS. In the event of litigation . . . to enforce this contract, the prevailing party shall be entitled to costs and reasonable attorneys fees. . . .(REPC, Depo. Ex. 3 (R 280-289))

25. The earnest money for the transaction at issue was on deposit with Brighton Title on June 5, 2007, despite the fact that since on or about May 27, 2007, and at the latest June 1, 2007, Deseret Sky knew that Cooper wasn't in title to the property (Statement Undisputed Facts of Plaintiff's Memorandum in Support of Motion for Summary Judgment, ¶¶ 9, 10, 11, 12 and 13 (R 231-232)).

26. Deseret Sky neither canceled the REPC by providing written notice to Seller nor delivered a written objection to Seller regarding the Buyer's Due Diligence by the June 8, 2007 Due Diligence Deadline (Cooper Affidavit, ¶ 8 (R 200); Gowans Depo., Pg. 54, lines 11-25 through Pg. 55, lines 1-5 (R 263); Gorringe Depo., Pg. 35, lines 7-24 (R 272)).

27. Brighton Title was to receive an additional $100,000 by the end of Deseret Sky's Diligence Period, if the contract wasn't cancelled or objected to by that date (REPC Depo. Ex. 3 (R 280-289); Addendum No. 1, ¶ 2, and Addendum No. 2, ¶¶ 1 and 6 (R 284-287); Gorringe Depo., Pg. 25, lines 11-19 (R 270)).

28. The June 8, 2007 Due Diligence Deadline came and went without Deseret Sky depositing an additional $100,000.00 (Gorringe Depo. Pg. 25, lines 11-21 (R 270)).

29. The REPC itself does not identify the underlying transaction as a "split closing" (REPC Depo. Ex. 3 (R 280-289));

30. In response to the following question posed to Jeffrey Gorringe in his deposition (Page 25, lines 5-10 (R 270)), Gorringe testified as follows:

> Q: I just want to make clear. So when you received the money, you received the contract, you understood that you would be holding that money in escrow to fulfill the obligations contained in this contract, Deposition Exhibit 3. Correct?
>
> A: Yes.

(Gorringe Deposition, Page 25, line 10 (R 270))

31. Mr. Gorringe further testified in his deposition: (i) that he understood that additional earnest money was to be deposited under the terms of the contract under certain conditions (Gorringe Deposition, Page 25, lines 11-14 (R 270)); (ii) that those conditions were that if the contract had not been canceled or objected to within the diligence period that another $100,000 was due (Gorringe Deposition, Page 25, lines 15-19 (R 270)); (iii) that under the contract Brighton Title was to forward the earnest money deposits to Metro National Title if the contract was not cancelled or objected to by the buyer after expiration of the REPC's diligence period (Gorringe Deposition, Page 25, lines 11-14 (R 270)); and (iv) that none of the earnest money deposit was ever forwarded to Metro National Title (Gorringe Deposition, Page 25, line 24 to Page 26, line 15 (R 270)).

32. On June 11, 2007, Deseret Sky sent a letter (back-dated to June 8, 2007) to Robert Cooper ostensibly terminating the REPC and instructing Brighton Title "to return all earnest money deposits to the Buyer." (Cooper Affidavit, ¶¶ 8, 9 and 10 (R 200); Depo. Ex. 12 (R 431)).

33. On June 12 of 2007 (four days after expiration of the diligence period, without cancellation or objection by Deseret Sky), Jeff Gorringe of Brighton Title informed Cooper that Brighton Title was going to release the earnest money deposit back to Deseret Sky even though Brighton Title was informed that Cooper claimed the money. (Gorringe Depo., Pg. 47, lines 20-25 through Pg. 48, lines 1-15 (R 274)).

34. By letter dated June 13, 2007, Wayne Gorringe of Brighton Title informed Deseret Sky:

a. that the $100,000 Brighton Title held in escrow were being returned to Deseret Sky;

b. that (despite the diligence period under REPC having expired five days prior (i.e., June 8, 2007), Brighton Title held out hope of "complet[ing] this transaction." (Gorringe Depo., Pg. 44, lines 2-25 (R 273); Depo. Ex. 14 (R 433)).

35. According to the REPC, after the end of that Diligence Period, if the contract wasn't cancelled or objected to, the earnest money was then to be forwarded to Metro National Title (REPC, Depo. Ex. 3, Addendum No. 3, ¶4 (R 288-289); Gorringe Depo., Pg. 26, lines 5-12 (R 270); Pg. 34, lines 8-23 (R 272); Pg. 36, lines 6-12 (R 272)).

36. None of the earnest money was ever forwarded to Metro National Title, but was instead released back to Deseret Sky even though Brighton Title was aware of Cooper Enterprises' claim to the deposit (Gorringe Depo., Pg. 26, lines 13-15 (R 270); Pg. 48, lines 3-11 (R 274); Pg. 59, lines 22-25 (R 276); Pg. 60, lines 1-18 (R 27)).

37. Even after the REPC's June 8, 2007 diligence period had expired, Deseret Sky was still in discussions with Cooper concerning the potential of having a new contract for the property. These discussions continued for almost a month and a half after the diligence period expired (Gowans Depo., Pg. 55, lines 6–10 (R 263); Pg. 56, lines 13–25 (R 263); Pg. 57, lines 1–

25 (R 264); Pg. 58, lines 12-25 (R 264); Pg. 59, lines 1-25 (R 264); Pg. 60, lines 1-25 (R 264); Pg. 61, lines 1-17 (R 265); Pg. 62, lines 10-25 through Pg. 63, lines 1-24 (R 265); Gorringe Depo., Pg. 55, lines 12-22 (R 275); Depo. Exhibits 16 and 17 (R 440-443; 445-448)).

38. As a result of Deseret Sky's default of its obligations under the REPC, no sale was transacted and Cooper was unable to purchase the Real Property under the Hansen Contract, causing Cooper to suffer an actual loss of $1,034,666.66 profit and to forfeit the $100,000 that Cooper had deposited in accordance with the Hansen Contract to acquire the Real Property (which would then, in turn, be sold to Deseret Sky). (Cooper Affidavit; ¶¶ 7, 11, 12 and 13 (R 200-201)).

39. Cooper elected to accept the earnest money as liquidated damages for Deseret Sky's default. (Cooper Affidavit, ¶ 14 (R 201); Depo. Ex. 15 (R 435-438)).

40. Cooper has made demand on Deseret Sky for payment of $200,000 as Earnest Money Deposit, as liquidated damages under the terms of the REPC, which Deseret Sky has failed and refused to pay (Complaint, Ex. C (R 20-23); Cooper Affidavit, ¶¶ 14 and 15 (R 201); Depo. Ex. 15 (R 435-438)).

41. Cooper has made demand on Brighton Title for payment of $100,000 initial earnest money deposit, as liquidated damages under the terms of the REPC, which Brighton Title has failed and refused to pay (Complaint, Ex. C (R 20-23); Cooper Affidavit ¶¶ 14 and 15 (R 201); Depo. Ex. 15 (R 435-438)).

42. Cooper has retained the services of an attorney to enforce its rights as set forth above and is entitled to an award of the attorney's fees and costs pursuant to paragraph 17 of the REPC (Cooper Affidavit, ¶ 16 (R 202); REPC Depo. Ex. 3 (R 280-289)).

SUMMARY OF THE ARGUMENTS

Under the terms of a Real Estate Purchase Contract for Land ("REPC"), an initial $100,000.00 in earnest money was to be deposited with Brighton Title. All of the earnest money was to become non-refundable and delivered to the Seller (Cooper) unless the contract was cancelled or objection made regarding Purchaser's (Deseret Sky's) diligence investigations. Neither objection nor cancellation was provided by Purchaser to Seller within the diligence period provided by the terms of the REPC. Nevertheless, contrary to the terms of the REPC, after the expiration of the diligence period, Brighton Title returned to Deseret Sky the initial $100,000.00 earnest money deposit it was holding in escrow.

Even though Deseret Sky did not properly object or terminate the contract timely, Brighton Title contends that it is not liable to Cooper because Cooper did not hold fee title to the property at the time the REPC was entered into (Appellant Brief, pages 38-40); however, Cooper (which was under contract to purchase the real property and thereafter transfer title to Deseret Sky) was not required to hold fee title.

Brighton Title also claims it is not liable to Cooper because the form of the transaction was prohibited by a bulletin issued by the Insurance Commissioner of the Utah Insurance Department (Appellant Brief, pages 21-22). Even Brighton Title, however, expressly concedes that the bulletin is merely advisory in nature, with no legal effect.

While Brighton Title contends that "[t]here are issues of fact which precluded both parties from being granted summary judgment," (Appellant Brief, pages 21) the record reveals no genuine issues of material fact exist to preclude the district court from granting Cooper's Motion for Summary Judgment. Brighton Title expressly conceded, in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and In Support of Brighton Title's Motion for

Summary Judgment in the instant action, that there were no genuine issues of material fact (R 478, 585, 697).

Brighton Title's contention that the district court committed reversible error when it granted Cooper's Motion for Summary Judgment without providing "analysis and reasoning for its decision (Appellant Brief, page 21)" is without merit as both a matter of record in the district court and of black letter law. Likewise, Brighton Title's contention that the district court committed reversible error by executing Cooper's draft of a proposed Ruling, is also without merit and without support in the law.

Brighton Title's contention that "a title company should not be bound to the terms of a contract to which it is not a party nor to which it has consented [sic] (Appellant Brief, page 21)" is a diversionary argument. The district court did not grant summary judgment on the basis that the Brighton Title was a party to the contract in question; moreover, the issue was not preserved for appeal.

Brighton Title's contention that it has no joint fiduciary duty (Appellant Brief, page 21) is without merit. Title companies are liable for the improper disbursement of funds they hold in escrow, and it is well established that an escrow agent is held to a high standard of care in dealing with its principals and assumes the role of the agent of both parties to the transaction.

Brighton Title's "belief" (respecting its challenge to the award of attorney's fees to Cooper against Deseret Sky) that any defendant party to a lawsuit has the right to object to any ruling of the court, even if the ruling is not made as to that particular defendant party (Appellant Brief, page 22), has no support of any legal authority and no support in reason or the fundamental principles of civil litigation.

By the same token, Brighton Title's "belief" that "it cannot be held liable for its alleged breach of contract (Appellant Brief, page 22)" because "Cooper breached first by affirmatively misrepresenting its state of ownership in the property" is without support as a matter of well-established and settled Utah real property law.

Brighton Title's argument that a title company, acting as escrow agent and insurer, is precluded by law from participating in transactions it cannot insure (Appellant Brief, pages 22-23) is without support in the facts or the law applicable to the instant case.

Having accepted the initial $100,000 earnest money from Deseret Sky in escrow, in its capacity as an escrow agent, Brighton Title was to forward these funds to Metro National Title (which in turn would be obligated to forward the earnest money on to Cooper) if the contract was not cancelled or objected to by the date the diligence period expired. Brighton Title did not forward the earnest money, but instead released the $100,000 back to Deseret Sky in default of its obligations to Cooper. When there are conflicting claims to the fund held by the escrow agent, the agent is neither required nor permitted to make his own determination as to the rights of the rival claimants. Title companies are liable for improper disbursement of funds they hold in escrow.

When the Diligence Period expired without objection or cancellation, Brighton Title had three rightful options with respect to the disposition of the earnest money that it held on deposit. Instead, Brighton Title chose a fourth path of wrongfully returning the initial earnest money deposit to Deseret Sky. Brighton Title is thus liable to Cooper for the amount of the initial deposit.

ARGUMENTS

I. THE DISTRICT COURT DID NOT RULE THAT BRIGHTON TITLE "VIOLATED" RULE 7(c)(3)(B) OF THE UTAH RULES OF CIVIL PROCEDURE, NOR DID THE DISTRICT COURT GRANT SUMMARY JUDGMENT BASED UPON A "VIOLATION" OF RULE 7(c)(3)(B) OF THE UTAH RULES OF CIVIL PROCEDURE.

The appellant contends that the district court erred as a matter of law in ruling Brighton Title violated Rule 7(c)(3)(B) of the Utah Rules of Civil Procedure. In its Minute Entry of February 19, 2009, however, the district court expressly states, "Brighton Title's failure to comply with the requirement of Rule 7 [(c)(3)(B)] was noted, but that was not the basis for the ruling," and "Since there were no material issues of fact, the matter was decided on the law." (R 783) The district court clearly did not base its ruling on the application of Rule 7(c)(3)(B). Accordingly, there is no error in the application of Rule 7(c)(3)(B) upon which to appeal the district court's ruling.

II. THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT AND COOPER IS ENTITLED TO A JUDGMENT AS A MATTER OF LAW.

While Brighton Title contends that "[t]here are issues of fact which precluded both parties from being granted summary judgment," (Appellant Brief, page 21) the record reveals no genuine issues of material fact exist to preclude the district court from granting Cooper's Motion for Summary Judgment. Brighton Title itself expressly conceded, in its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and In Support of Brighton Title's Motion for Summary Judgment:

> *In the instant action, there are no genuine issues of material fact.* While Brighton expresses no opinion or argument on the Plaintiff's right to judgment against Defendant Deseret Sky, Brighton argues that as a matter of law, Plaintiff is not entitled to judgment against Brighton. This Court must deny Plaintiff's Motion for Summary Judgment against Brighton. However, because *there are no genuine issues of material fact*[.] (R 478, 585)

(Emphasis added.)

Although Brighton Title concedes that it does not dispute the facts alleged by Cooper in Cooper's Motion for Summary Judgment, Brighton Title still contends that it presented the district court with "additional facts which should have created a genuine issue of material fact" sufficient to preclude the granting of summary judgment. These "additional facts" are, according to Brighton Title, that Cooper did not hold fee title to the property that was the subject of the REPC, which Brighton Title contends raises an issue of fact[2] as to whether Cooper held sufficient interest in the real property to contract to sell it to Deseret Sky. Such "additional facts," however, 1) were already part of the record and known to the district court at the point when the court ruled on both Cooper's Motion for Summary Judgment and on Brighton Title's Motion for Summary Judgment; and 2) as shall be shown *infra*, Brighton Title's "additional facts," are not material to Cooper's Motion for Summary Judgment.

Brighton Title contends in its Brief (See Appellant's Brief at page 24) that the affidavit of Richard Peter Stevens established a "question of fact" as to whether Utah Insurance Department Bulletin 2007-1 has the force of law. Such contention, however, is patently and conclusively without merit. Brighton Title itself correctly concedes, *inter alia*: "[T]he Court need not give deference to the interpretative Bulletin . . .(Appellant Brief, page 27)," "Admittedly, the Bulletin [2007-1] is interpretative and therefore this Court need not give deference to the interpretation set forth in Bulletin 2007-1;"[3] and "Bulletins do not have the force of law and cannot be violated per se." (See Paragraph 6, Affidavit of Richard Peter Stevens, form Assistant Commissioner of

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[2] Given that it is undisputed Cooper did not hold fee title to the property that was the subject of the REPC, such raises a question of *law*—not of fact—as to whether Cooper held sufficient interest in the real property to contract to sell it to Deseret Sky.

[3] Brighton Title's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, page 11 (R 588).

the Utah Department of Insurance (Exhibit "H" to Bright Title's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment (R 669)). Indeed, Brighton Title's concession on these points comports with the law (See Appellee's Argument VI, *infra*).

Brighton Title contends that the oral statement of Brighton Title's Jeff Gorringe (averred to have been made June 1, 2008[4], allegedly informing Metro National Title that Deseret Sky would not close on the transaction because Cooper was not in title) constituted an objection before the June 8, 2008 due diligence expiration date. Even if Brighton Title's contention were true (and it is not; objections under the REPC were required to be in writing and made by the buyer, see *infra*), such an ostensible fact does not raise a genuine and material issue that precluded the district court from granting Cooper's Motion for Summary Judgment. Paragraph 24 of the REPC provided for a Due Diligence Deadline of June 8, 2007 (R 234 and 283). Paragraph 8.1 provides:

> Due Diligence Deadline. No later than the Due Diligence Deadline referenced in Section 24(b) Buyer shall: (a) complete all of Buyer's Due Diligence; and (b) determine if the results of Buyer's Due Diligence are acceptable to Buyer. (R 281)

In accordance with the REPC, the earnest monies became non-refundable on June 8, 2007, unless the REPC was timely cancelled by Deseret Sky. In that regard, the REPC provides:

> 8.2 Right to Cancel or Object. If Buyer determines that the results of Buyer's Due Diligence are unacceptable, Buyer may, no later than the Due Diligence Deadline, either: (a) cancel this Contract by providing written notice to Seller, whereupon the Earnest Money Deposit shall be released to Buyer; or (b) provide Seller with written notice of objections.
>
> 8.3 Failure to Respond. If by the expiration of the Due Diligence Deadline, Buyer does not (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, the Buyer's Due Diligence shall be deemed approved by Buyer

[4] Brighton Title likely meant to contend that Mr. Gorringe made his alleged oral statement to Metro National Title was made on June 1, *2007*, not 2008 (See ¶ 14 of the Affidavit of Jeff Gorringe R 566-567).

> and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer. (R 281)

Under the provisions of the REPC, objection or cancellation by the Buyer had to take the form of "written notice to Seller." Jeff Gorringe's alleged oral statement of indeterminate date[5] to Metro National Title clearly does not constitute compliance with paragraphs 8.2 and 8.3 of the REPC. Accordingly, Jeff Gorringe's alleged oral statement to Metro National Title does not raise a genuine and material issue that precluded the district court from granting Cooper's Motion for Summary Judgment. Moreover, Brighton Title accepted the earnest money in escrow as of June 5, 2007, four days *after* it claims to have made objection to the contract.

Further, the mere opinions of Matt Sager (underwriting counsel for Stewart Guaranty Company) articulated in his affidavit (R 570-574) do not raise a genuine issue of material fact that precluded the district court from granting Cooper's Motion for Summary Judgment. It is not the province of Jeff Gorringe, Matt Sager, and people like them to arrogate to themselves the district court's construction or the application of the law. Notwithstanding, even Matt Sager does not "conclude" that the REPC was an illegal transaction (R 572), even though Brighton Title claims he did (See Appellant Brief, page 24).

While Brighton Title contends, on appeal, that there was a question of fact concerning "whether Cooper had any practical ability to obtain title during the executory period of the REPC without violating Utah law (Appellant Brief, page 25)," Brighton Title conceded in its Memorandum in Support of its Counter Motion for Summary Judgment (R 478-480) that Cooper was not required under Utah law to be on title during the executory period of the REPC, and that a seller under a real estate contract that represents itself as having title need not have marketable

[5] In his affidavit Mr. Gorringe does not indicate on what date he allegedly made his oral statement to Metro National Title (See ¶ 14 of the Affidavit of Jeff Gorringe R 566-567).

title until final payment is made or tendered.[6] Thus, Brighton Title raised no genuine and material issue as to title that precluded the district court from granting Cooper's Motion for Summary Judgment.

III. THE DISTRICT COURT DID NOT "FAIL" TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN GRANTING COOPER SUMMARY JUDGMENT, AND THUS DID NOT ERR.

Brighton Title contends in its Appellate Brief (page 46), "The trial court err[ed] as a matter of law and abused its discretion by failing to provide any analysis or reasoning in granting Cooper summary judgment." Brighton Title cites Orvis v. Johnson (177 P.3d 600 (Utah 2008), 2008 UT 2) for the proposition that the district court was required to make factual findings and/or to articulate its legal conclusions when granting Cooper's motion for summary judgment, but Orvis articulates no such rule. Rule 52(a) of the Utah Rules of Civil Procedure provides, in pertinent part:

> The trial court *need not enter findings of fact and conclusions of law in rulings on motions*, except as provided in Rule 41(b). The court shall, however, issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground. (emphasis added)

Brighton Title's citation to 9[C] Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 2579 (1971) for the proposition that a trial court must issue findings of fact and conclusions of law on a motion for summary judgment is also demonstrably erroneous, as § 2579 of 9[C] is part of Chapter 7 of Wright & Miller's Federal Practice & Procedure, which chapter is entitled "Trials," and has nothing to do with motions for summary judgment.[7] Thus, Brighton

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[6]See Neves v. Wright, 638 P.2d 1195, 1197 (Utah 1981) and discussion thereof at Argument IX and X in this Brief of Appellee.

[7] For Wright & Miller's treatment of motions for summary judgment, see Chapter 8, in volume 9C. Furthermore, Brighton Title's citation to J. Pochynok Co. v. Smedsrud, (116 P.3d 353 (Utah 2005)) for the proposition that that the district court in the instant case was required to make findings of fact or conclusions of law is inapt; J. Pochynok was a case that was tried, and to a

Title's argument that the trial court "failed" to make any findings or provide its legal conclusions is conclusively without merit as a matter of law.

Notwithstanding the provisions of Utah Rules of Civil Procedure, Rule 52(a), Brighton Title concedes in its Appellate Brief (page 46-47), that following the filing of Brighton Title's motion for "clarification" of the court's original minute entry, in which the district court granted summary judgment, "the Court entered another minute entry. (R 783-788)," (dated February 19, 2009) and that "[i]n this minute entry, the Court clarified its prior minute entry". On pages 46-47 of its Appellate Brief Brighton Title quotes the district court's entire minute entry (consisting of two, double-spaced pages (R 783-784)). Despite the district court's minute entry of February 19, 2009 constituting "a brief written statement of the ground for its decision (See Utah Rules of Civil Procedure, Rule 52(a))," Brighton Title contends, "the trial court absolutely erred as a matter of law in granting summary judgment without so much as a single stitch of legal reasoning or analysis to support its decision (Appellate Brief, pages 47-48)," then further contends, "But for the motion for clarification, neither this Court nor Brighton Title would have had any idea the basis upon which the Court concluded judgment was appropriately granted to Cooper." In such a contention lies the fatal flaw in Brighton Title's argument.

The court, in response to Brighton Title's motion for clarification of the district court's first minute entry, provided yet another "brief written statement of the ground for its decision" in compliance with Utah Rules of Civil Procedure, Rule 52(a). Even Brighton Title acknowledges in its Appellate Brief (page 48) that the district court's minute entries "consisted of both its decision and subsequent explanation of that decision," yet Brighton Title contends that somehow

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jury. J. Pochynok is a not a summary judgment case; thus, it was not governed by Utah Rules of Civil Procedure, Rule 52(a) (which expressly excuses the district court from entering findings of fact and conclusions of law in rulings on motions for summary judgment).

the actions of the district court in clarifying and elaborating upon its decision with a second minute entry (issued upon the request of Brighton Title, no less) constitute reversible error on the part of the district court. Such contentions are facially without merit (*See also* Appellee's Argument VII *infra* for further argument).

IV. BRIGHTON TITLE OWED A FIDUCIARY DUTY TO COOPER.

Upon the performance of the condition or the happening of the event stipulated in the escrow agreement, it is the duty of the depositary to deliver what is deposited in the escrow, and the depositary, being as much the agent of the grantor as of the grantee, is as much bound to deliver on the performance of the specified condition or the happening of the specified event as he or she is bound to withhold until the performance or the happening of the event (*See, e.g.,* 28 Am. Jur. 2d Escrow § 28).

Brighton Title accepted the initial $100,000 earnest money from Deseret Sky in escrow, in its capacity as an escrow agent for the transaction underlying the REPC. Brighton Title is identified in the REPC as the escrow agent.[8] At the expiration of the diligence period, if the contract was not cancelled or objected to, Brighton Title was to forward the earnest money to Metro National Title, and Cooper was to receive the earnest money. Brighton Title did not forward the $100,000 in earnest money to Metro National Title, but instead disbursed that $100,000 to Deseret Sky in default of Brighton Title's obligations to Cooper.

Utah Code § 7-22-108 provides for an escrow agent's duties as follows:

> (2) All other assets or property received by an escrow agent in accordance with an escrow agreement shall be maintained in a manner which will reasonably preserve and protect the property from loss, theft, or damage, and

[8] Paragraph 2 of Addendum No. 1 to the REPC provides, in pertinent part, "Earnest Money to be $100,000 deposited w/ Brighton Title Company upon acceptance. An additional $100,000 earnest money to be deposited with Brighton Title Company after Buyer's Due Diligence deadline." (R 280-289).

> which will otherwise comply with all duties and responsibilities of a fiduciary or bailee generally.

Brighton Title accepted the earnest money and agreed to serve as the escrow agent for the REPC transaction. Brighton Title chose to act as it did. When there are conflicting claims to the fund held by the escrow agent, the agent is neither required nor permitted to make its own determination as to the rights of the rival claimants, but may rely upon any applicable contractual provisions in refusing to deliver the documents to either party and cannot be held liable for exercising its right to refuse delivery, or can seek a judicial determination by interpleader of the entitlement of the parties. 28 Am. Jur. 2d Escrow § 28.

When the Diligence Period expired without objection or cancellation, Brighton Title had three rightful options with respect to the disposition of the earnest money that it held on deposit. First, hold the money pending an agreement between the parties to the REPC; second, to forward the money on to Metro National Title, as required by the terms of the REPC; or third, interplead the funds, as allowed by Rule 22, Utah Rules of Civil Procedure. Instead, Brighton Title chose a fourth path of wrongfully returning the initial earnest money deposit to Deseret Sky. Brighton Title is thus liable to Cooper for the amount of the initial deposit.

Brighton Title's liability is established by black letter law: "Title companies will be liable for improper disbursement of funds they hold in escrow" (2 Title Insurance Law § 20:7. Title companies' duties as escrow and closing agents—handling funds).

It is well established that an escrow agent assumes the role of the agent of both parties to the transaction, and as such, a fiduciary is held to a high standard of care in dealing with its principals.[9] That Brighton Title is not a signatory to the REPC does not absolve Brighton Title of its fiduciary, established legal duties as an escrow agent.

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[9] Freegard v. First Western Nat. Bank, 738 P.2d 614, 616 (Utah 1987) (citing National Bank v.

V. BRIGHTON TITLE'S BREACH OF DUTY DAMAGED COOPER.

Brighton Title attempts to leverage further its invalid "not a party to the REPC" argument to suggest that Cooper can make no claim to damages under the REPC. Not only does Cooper have a clear-cut damages claim, such claim is as quintessentially clear-cut as a matter of law as it can get, i.e., in the form of liquidated damages. As to liquidated damages, Brighton Title appears to argue that Cooper cannot claim liquidated damages because Cooper's actual damages "are not difficult to calculate," in light of "Cooper's calculation of the damages to the very last dollar."[10] Oddly, Brighton's argument is that because Cooper's claimed damages indisputably *exceed* the liquidated damages award provided in the REPC, Cooper is somehow barred from electing to claim liquidated damages. As a matter of contractual right, Cooper was entitled to the earnest money as liquidated damages upon its election following breach of the REPC.[11] There is no

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Equity Investors, 81 Wash.2d 886, 910, 506 P.2d 20, 35 (1973)[8]; *see also* Morris v. Clark, 100 Utah 252, 257, 112 P.2d 153, 155 (Utah 1941); *cert. denied,314* U.S. 584, 62 S.Ct. 361, 86 L.Ed. 472 (1941); *see also* 28 Am. Jur. 2d Escrow § 26. Depositary is a fiduciary)). Deviation from those terms without the mutual consent of the parties concerned will subject the agent to liability for damages caused by his departure. Miller v. Craig, 558 P.2d 984 (Ariz. App. 1976).

[10] The undisputed averment of the Affidavit of Robert T. Cooper, Jr. (filed with the court by Plaintiff, Cooper Enterprises) states, on the subject of damages:

> 13. Thus, because Deseret Sky has defaulted in its obligations to purchase the Real Property under the REPC, Cooper Enterprises has suffered actual losses of $100,000.00 as forfeiture of Cooper Enterprises' earnest money under the Hansen Contract, and $1,034,666.66 as loss of the gross profit Cooper Enterprises would have realized as the difference in price between the Hansen Contract and the REPC. (R 201)

[11] A provision for liquidated damages is generally enforceable, the same as the other terms of a contract, [unless] the damages thus stipulated are so excessive that they bear no reasonable relationship to the actual damages suffered, [in which case] it would be unconscionable to give it effect, [and] the court will regard it as a penalty and refuse to enforce it. Young Elec. Sign Co. v. Vetas, 564 P.2d 758, 760 (Utah,1977); Foote v. Taylor, 635 P.2d 46, 49 (Utah,1981) (If a provision in a contract provides for liquidated damages which are so grossly excessive in comparison to actual damage suffered that it is unconscionable, the court will not enforce it.); Andreasen v. Hansen, 335 P.2d 404, 407 (Utah,1959) (It is true that provisions for 'stipulated' or

authority for the proposition that a plaintiff must forego liquidated damages when damages are "easily calculated" after the fact and actual damages exceed the liquidated damages provision of the breached contract.

Where the parties to a contract stipulate to the amount of liquidated damages that shall be paid in case of a breach, such stipulation is, as a general rule, enforceable, if the amount stipulated is not disproportionate to the damages actually sustained. Perkins v. Spencer, 243 P.2d 446, 449, 121 Utah 468, 243 P.2d 446 (Utah 1952) (citing Bramwell Inv. Co. v. Uggla, 81 Utah 85, 16 P.2d 913, 916 (Utah 1932)). In the instant case, the amount of forfeiture involved is $200,000 on a contract of $7,500,000, from which Plaintiff's would have profited in the amount of approximately $1,000,000. In fact, Cooper ended up losing not only its expected profit, but forfeited to its Seller, W.H. Hansen, a $100,000 earnest money deposit of its own; thus the liquidated damages are not greatly disproportionate to the actual damage and much less than actually suffered by Cooper. *See* Reliance Ins. Co. v. Utah Dept. of Transp., 858 P.2d 1363, 1367 (Utah 1993).

VI. UTAH INSURANCE DEPARTMENT BULLETINS DO NOT HAVE THE FORCE OF LAW; THE REPC COMPLIED WITH LAW.

Contrary to the assertions of Brighton Title, Utah Insurance Department Bulletin 2007-1 patently does not have the force of law. Brighton Title contends that the REPC is a "transaction deemed inappropriate and illegal by the Utah State Department of Insurance," (R 34) and that as

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'liquidated' damages in cases of breach of contract have sometimes prescribed forfeiture of amounts so grossly disproportionate to any actual damage that to enforce the provision would shock the conscience. In such instances, the courts, invoking their powers of equity, refuse to enforce such penalties. In that connection however, it is to be kept firmly in mind, that the courts recognize the rights of parties freely to contract and are extremely reluctant to do anything which will fail to give full recognition to such rights.); Robbins v. Finlay, 645 P.2d 623, 625-626 (Utah, 1982) (Liquidated damages provisions are enforceable if designed to provide fair compensation for a breach based on a reasonable relation to actual damages. (*citing* Young Elec. Sign Co. v. Vetas, Utah, 564 P.2d 758, 760 (Utah 1977)).

a consequence: "the contract is impossible to enforce based on the 'flip' transaction Plaintiffs were attempting to transact;" (R 34) and "Brighton Title was prohibited by its underwriter from participating in the transaction." (R 34) Brighton Title, however, points to no statute or administrative rule that deems the REPC unenforceable as illegal, reason being that no such statute or administrative rule exists.

Brighton Title cites to Utah State Department of Insurance "Bulletin 2007-1" to contend that the REPC is an illegal transaction and thus unenforceable. The opinion of the Utah State Department of Insurance, however, simply is not law, rule, nor administrative order, and is thus not enforceable as law.[12] Bulletin 2007-1, therefore, does not (it cannot) have the force of law; the REPC does not constitute a violation of "law" that does not exist in the form of Bulletin 2007-1; and Bulletin 2007-1 does not relieve Brighton Title of its obligations as the escrow holder. Notwithstanding the fact that Brighton Title cannot claim the REPC "violated" the non-law that is Bulletin 2007-1, Brighton Title nevertheless gratuitously concludes that Bulletin 2007-1 deems the transaction underlying the REPC a violation of Utah's good funds statute. This argument, which derives from the erroneous premise that Bulletin 2007-1 is law, is thus also patently erroneous. Brighton Title even concedes the point that nothing in the transaction underlying the REPC violated Utah Code § 31A-23a-406.

Brighton Title's Utah Rules of Civil Procedure 30(b)(6) witness, Jeffrey Gorringe, was specifically examined concerning whether the transaction contemplated in this matter violated any provision of the so-called good funds statute:

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[12] *See* Utah Code Title 31A, Chapter 2, Administration of the Insurance Laws, and Utah Code Title 63, Chapter 46a, Utah Administrative Rulemaking Act (now appearing in Title 63G, Chapter 3); to issue a mandatory and enforceable "rule" or an "order," an action by the Utah Department of Insurance must comply with particular processes prescribed by statute. On its face, it is clear that that Bulletin 2007-1 does not comply with these prescribed processes.

Q. So, every one of those requirements [referring to Utah Code § 31A-23a-406, "the good funds statute"] was met in this transaction. There's nothing in this—these sections that prohibit this transaction. Right?

A. [Mr. Gorringe] Right.

* * *

Q. And Cooper then – within this section, could have simultaneously, upon receipt of wired funds or cash, distributed that money to Hansen, to pay the Hansen contract. Correct? It all could have been done the same day?

A. It all could have been done simultaneously.

Q. Is there anything that you see in the Code sections that are cited here [Utah Code § 31A-23a-406] . . . that would have been violated by the transaction we are talking about here today?

A. No.

(Gorringe Depo., Pg. 68, line 25 to page 69, line 3; Pg. 70 lines 9 - 21 (R 467-468, 691-692)). Brighton Title even acknowledges in its Appellate Brief that the district court "need not give deference to the interpretative Bulletin [2007-1]" and cites the case of Nelson v. Betit, 937 P.2d 1298, 1306[13], 316 Utah Adv. Rep. 31 (Utah App. 1997) in support of this rule.

Brighton Title clearly and repeatedly acknowledges and concedes both that the REPC did not violate any law and that Brighton Title held the funds delivered to it in escrow. It is well established that an escrow agent assumes the role of the agent of both parties to the transaction, and such a fiduciary is held to a high standard of care in dealing with its principals.[14] Deviation from those terms without the mutual consent of the parties concerned will subject the agent to

[13] Government agency interpretation is neither given "legislative effect" nor is it binding on the courts because the interpretation at issue does not involve a regulation promulgated upon an express delegation from Congress by formal rulemaking.

[14] Freegard v. First Western Nat. Bank, 738 P.2d 614, 616 (Utah 1987) (citing National Bank v. Equity Investors, 81 Wash.2d 886, 910, 506 P.2d 20, 35 (1973)[8]; *see also* Morris v. Clark, 100 Utah 252, 257, 112 P.2d 153, 155 (Utah 1941); *cert. denied,314* U.S. 584, 62 S.Ct. 361, 86 L.Ed. 472 (1941); *see also* 28 Am. Jur. 2d Escrow § 26. Depositary is a fiduciary)).

liability for damages caused by his departure. Miller v. Craig, 558 P.2d 984, 986, 27 Ariz.App. 789, 791 (Ariz. App. 1976).[15]

On May 31, 2007, Brighton Title knew that Cooper did not hold fee title to the Real Property (Gorringe Depo., Pg. 17, lines 12-24 (R 268)). On June 1, 2007 (the next day), Brighton Title informed Deseret Sky that Cooper did not hold fee title to the Real Property (Gorringe Depo., Pg. 18, lines 10-12 (R 268)). With this knowledge, Brighton Title nevertheless accepted the initial $100,000 earnest money from Deseret Sky in escrow, in its capacity as an escrow agent.[16] At the end of the Diligence Period, if the contract was not cancelled or objected to, the earnest money was to be forwarded to Metro National Title.[17] None of the earnest money deposited with Brighton Title was ever forwarded to Metro National Title; instead, Brighton Title released the funds back to Deseret Sky in default of its obligations to Cooper. Such plainly does not constitute the law-abiding exercise of fiduciary duty on the part of an escrow agent.

Brighton Title claims that it "was faced with an express Department of Insurance Bulletin which said the proposed transaction violated Utah law," and concludes that it "could do nothing but withdraw from the transaction and refund the money to its depositor, Deseret Sky

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[15] *See also* 28 Am. Jur. 2d Escrow § 46. Actions at law; election of remedies:

> In addition to equitable remedies, actions at law are maintainable for money damages against the depositary when he or she fails to comply with the agreement or breaches his or her duties thereunder, as by refusing to deliver the escrowed item as required by the agreement. *Id.*

[16] 30A C.J.S. Escrows § 18. Liabilities. A depositary is liable for a breach of the duties assumed by him or her under the terms of the escrow contract. If the depositary deviates from the terms of the escrow agreement without the mutual consent of the parties concerned, violates duties assumed under the terms of the escrow contract or instructions, or breaches fiduciary duties the depositary is liable in damages for the loss suffered thereby.

[17] Plaintiff s Undisputed Facts, Memorandum in Support of Motion for Summary Judgment, (R 233 and 236).

Development." (Appellant Brief, page 28) Nothing could be farther from the truth, and Brighton Title's equivocations belie its contentions.

Opinion, which is not law, intrinsically does not have the force of law in a court of law. Yet Brighton Title's claims—on the one hand—that failure to comply with Bulletin 2007-1 risks sanction by the *Utah Insurance Department* (not a court of law), but on the other hand concedes that Bulletin 2007-1 does not have the force of law. It is Brighton Title that violated the law governing escrow holders by failing to uphold its statutory fiduciary duty[18] by choosing an extra-contractual, illegal course of action[19] and by failing to choose from three rightful options with respect to the disposition of the earnest money that it held on deposit (i.e., hold the money pending an agreement between the parties to the REPC, forward the money on to Metro National Title, as required by the terms of the REPC, or interplead the funds, as allowed by Rule 22, Utah Rules of Civil Procedure).[20] Instead, Brighton Title chose a fourth path of wrongfully returning

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[18] See Utah Code § 7-22-108, which provides for an escrow agent's duties as follows:

> (2) All other assets or property received by an escrow agent in accordance with an escrow agreement shall be maintained in a manner which will reasonably preserve and protect the property from loss, theft, or damage, and which will otherwise comply with all duties and responsibilities of a fiduciary or bailee generally.

[19] When there are conflicting claims to the fund held by the escrow agent, the agent is neither required nor permitted to make its own determination as to the rights of the rival claimants, but may rely upon any applicable contractual provisions in refusing to deliver the documents to either party and cannot be held liable for exercising its right to refuse delivery, or can seek a judicial determination by interpleader of the entitlement of the parties. 28 Am. Jur. 2d Escrow § 28.

[20] It must be borne in mind that Brighton Title accepted escrow after it became aware that Cooper was not in title: On May 31, 2007, Brighton Title knew that Cooper Enterprises did not hold fee title to the Real Property (Deposition of Jeffrey Gorringe, Pg. 17, lines 12-24 (R 268)). On June 1, 2007 (the next day), Brighton Title informed Deseret Sky that Cooper Enterprises did not hold fee title to the Real Property (Gorringe Depo., Pg. 18, lines 10-12 (R 268)). Notwithstanding this knowledge, Brighton Title accepted the initial $100,000 earnest money from Deseret Sky in escrow, in its capacity as an escrow agent.

the initial earnest money deposit to Deseret Sky. Brighton Title is thus liable to Cooper for the amount of the initial deposit of $100,000.00. Brighton Title's liability is established by black letter law: "Title companies will be liable for improper disbursement of funds they hold in escrow" (2 Title Insurance Law 20:7. Title companies' duties as escrow and closing agents—handling funds).

Both undisputed fact and well-established Utah law conclusively refute Brighton Title's "split escrow" argument. Brighton Title's contention that the transaction contemplated by the REPC was illegal and thus void rests on the demonstrably erroneous argument that the REPC violated "the law" as stated in a Utah State Department of Insurance Bulletin 2007-1 and Bulletin 2007-5. There is no legal basis for Brighton Title's claim. Brighton Title fails to articulate how the REPC ostensibly violates the underlying statute which Bulletin 2007-1 or Bulletin 2007-5 attempts to interpret[21] (i.e., Utah Code § 31A-23a-406(1)).[22] The REPC is indisputably a legal transaction as to Brighton Title. Brighton's "split escrow" argument that cites to § 31A-23a-406(1) and Bulletin 2007-5 is but another of many red herrings Brighton Title has thrown in the

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[21] To issue a mandatory or enforceable "rule"—which neither Bulletin 2007-1 nor Bulletin 2007-5 are—the Utah Department of Insurance must comply with particular processes prescribed by statute (see, generally, Utah Code §§31A-2-101, et seq. and Utah Code §§63-46a-1, et seq. (renumbered by Laws 2008 and now appearing at Utah Code §§63G-3-101, et seq.).

Even Brighton Title itself stops short of claiming that Bulletin 2007-1 (and by the same rationale, Bulletin 2007-5) has the force of laws when it correctly states:

> "Admittedly, the Bulletin [2007-1] is interpretative and therefore this Court need not give deference to the interpretation set forth in Bulletin 2007-1;"6

and

> "Bulletins do not have the force of law and cannot be violated *per se*."

(See Paragraph 6, Affidavit of Richard Peter Stevens, former Assistant Commissioner of the Utah Department of Insurance (Exhibit "H" to Brighton Title's Memorandum)

[22] For the full text of Subsection (1) of Utah Code § 31A-23a-406, which is the subject of Bulletin 2007-1, See the first two pages of the Addendum to Brief of Appellee.

path of an otherwise straightforward analysis. Contrary to Brighton Title's gratuitous claims that "Cooper elected the transaction close as a 'split closing'" (Appellant Brief, page 29), the record contains no such fact. The REPC itself does not identify the transaction underlying the REPC as a "split closing," and in response to the following question (posed to Brighton Title's Jeffrey Gorringe in his deposition (Gorringe Deposition, Pg. 25, lines 5-10 (R 270)):

> Q: I just want to make clear. So when you received the money, you received the contract, you understood that you would be holding that money in escrow to fulfill the obligations contained in this contract, Deposition Exhibit 3 [the REPC]. Correct?
>
> Mr. Gorringe replied:
>
> A. Yes.

Brighton Title clearly understood that it, in agreement with the parties to the transaction, held money in escrow to fulfill certain obligations under the REPC. Mr. Gorringe further stated in his deposition:

- that he understood that additional earnest money was to be deposited under the terms of the REPC under certain conditions (Gorringe Deposition, Pg. 25 (R 270));
- that those conditions were that if the contract had not been canceled or objected to within the diligence period that another $100,000 was due (Id.);
- that under the contract Brighton Title was to forward the earnest money deposits to Metro National Title if the contract was not cancelled or objected to by the buyer after expiration of the REPC's diligence period (Id.); and
- that none of the earnest money deposit was ever forwarded to Metro National Title (Id.).

Brighton Title had a contractual and fiduciary duty to both parties when—and because—it willingly and knowingly accepted and acted in its capacity as escrow agent. It did not have the option, much less the "legal obligation," to violate its contractual duties; instead, it

should have held the funds pending an agreement between the parties, interpleaded the escrowed funds or complied with the contractual terms that governed it. Consequently, in view of the undisputed facts surrounding Brighton Title's involvement in the transaction, Brighton Title's liability is established by black letter law: "Title companies will be liable for improper disbursement of funds they hold in escrow" (2 Title Insurance Law § 20:7. Title companies' duties as escrow and closing agents—handling funds).

> It is well established that an escrow agent assumes the role of the agent of both parties to the transaction, and as such, a fiduciary is held to a high standard of care in dealing with its principals.

Freegard v. First Western Nat. Bank, 738 P.2d 614, 616 (Utah 1987) (citing National Bank v. Equity Investors, 81 Wash.2d 886, 910, 506 P.2d 20, 35 (1973)[23]; *see also* Morris v. Clark, 112 P.2d 153, 155 (Utah 1941), 100 Utah 252, 257; *cert. denied,* 314 U.S. 584, 62 S.Ct. 361, 86 L.Ed. 472 (1941); *see also* 28 Am. Jur. 2d Escrow § 26. Depositary is a fiduciary)). Deviation from

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[23] See Schoepe v. Zions First National Bank, 750 F.Supp. 1084, at 1086-87 and n.4 (D. Utah 1990), where it discussed "*Utah Case Law on Escrow Agency*":

In reversing the trial court in Freegard v. First Western Nat'l Bank, 738 P.2d 614 (Utah 1987), the Utah Supreme Court concluded that the complaint adequately stated a cause of action against the escrow agent based upon the fiduciary duty the agent owed to its principal. In so holding, the Utah Supreme Court cited with approval National Bank v. Equity Investors, 81 Wash.2d 886, 910, 506 P.2d 20, 35 (1973). National Bank held that an escrow agent's duties are defined by the escrow instructions and that the agent becomes liable to its principals for damage resulting from breach of the instructions or from exceeding authority conferred by the instructions. *See* 506 P.2d at 35:

> An escrow holder is an agent. Whether he be designated escrow agent or escrow holder, or both, makes little difference in law; the important thing is that as an agent, holder, or trustee for the parties, he occupies a fiduciary relationship to all parties to the escrow. As an agent, trustee or holder, the escrow holder owes a fiduciary duty to his principals in the same way that all agents are held to such standards.

those terms without the mutual consent of the parties concerned will subject the agent to liability for damages caused by his departure. Miller v. Craig, 558 P.2d at 986 (Ariz. App. 1976).[24]

VII. THE COURT DID NOT ERR IN ENTERING THE RULING PREPARED BY AND SUBMITTED TO THE COURT BY COOPER.

Having unpersuasively argued that the district court did not adequately provide a brief written statement of the ground for its decision in the form of its two minute entries, Brighton Title argues paradoxically that the district court's twenty-four- page (24-page) "Ruling on Plaintiff's Motion for Summary Judgment and Defendant Brighton Title Company's Motion for Summary Judgment" (R 804-828) constituted an abuse of the district court's discretion (See Appellate Brief, page 48).

Without any substantive explanation, Brighton Title gratuitously contends that the district court's adoption of Cooper's proposed "Ruling on Plaintiff's Motion for Summary Judgment and Defendant Brighton Title Company's Motion for Summary Judgment" constitutes an abuse of discretion. Such arguments, in the face of Brighton's initial claims that the district court did "too little" to articulate its summary judgment decision, are both equivocal and, in their own right, without merit as well.

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[24] See also 28 Am. Jur. 2d Escrow § 46. Actions at law; election of remedies:

> In addition to equitable remedies, actions at law are maintainable for money damages against the depositary when he or she fails to comply with the agreement or breaches his or her duties thereunder, as by refusing to deliver the escrowed item as required by the agreement. *Id.*

30A C.J.S. Escrows § 18. Liabilities. A depositary is liable for a breach of the duties assumed by him or her under the terms of the escrow contract. If the depositary deviates from the terms of the escrow agreement without the mutual consent of the parties concerned, violates duties assumed under the terms of the escrow contract or instructions, or breaches fiduciary duties the depositary is liable in damages for the loss suffered thereby.

Despite the district court issuing its twenty-four-page Ruling on Plaintiff's Motion for Summary Judgment and Defendant Brighton Title Company's Motion for Summary Judgment, Brighton Title contends that the district court erred "in both failing to provide sufficient legal analysis and reasoning to support its decision" (See Appellate Brief, page 50-51) and "in approving and executing a ruling which was submitted without leave of the Court and was not in conformity with the Court's express decision." (Id.) Brighton Title cites to no authority for these patently contradictory arguments. There is no law or rule that bars Cooper from submitting a proposed order that the district court accepts and adopts as its own. Neither is there a law or rule that puts a page limit on a district court's rulings. Brighton Title cannot complain that the district court did both too little and too much in issuing its ruling on Cooper's motion for summary judgment.[25]

VIII. BRIGHTON TITLE HAS NO STAKE IN COOPER'S ATTORNEY FEE CLAIM AGAINST DESERET SKY, AND THUS HAS NO BASIS FOR CHALLENGING THE ATTORNEY FEE AWARD AGAINST DESERET SKY.

The Ruling and judgment of the district court make no attorney fees award against Brighton Title. While the district court utilized the term "standing" when ruling that Brighton Title was barred from objecting to the court's award of attorney's fees to Cooper as against Deseret Sky, nomenclature is not determinative of the matter. The principle upon which the district court made its ruling is sound, i.e., Brighton Title is not a real party in interest as to Cooper's attorney's fee claim against Deseret Sky.

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[25] "Although we may search the record in an attempt to reconstruct the trial court's reasoning, the better and more reliable approach, particularly in a matter of this complexity, is for the trial court to explain its decision in a written memorandum decision or order." Free Motion Fitness, Inc. v. Wells Fargo Bank West, NA, 208 P.3d 1066, n.6 (Utah Ct. App. 2009), 629 Utah Adv. Rep. 3, 2009 UT App 120.

> "[T]he 'real party in interest' is the party who, by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit [or suffer, as the case may be] from the recovery. . . ."

(Charles Alan Wright, The Law of Federal Courts § 70, at 490 & n.2 (5th ed. 1994))

Brighton Title does not explain how—by virtue merely of being one defendant among two—it acquired a stake in the dispute over a claim for attorney's fees made by Cooper against Deseret Sky. "In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." D.U. Company, Inc. v. Jenkins, ----- P.3d ----- (2009), ¶ 11 (Utah Ct. App. 2009); 2009 Ut.App. 195 (citing Provo City Corp. v. Thompson, 2004 UT 14, ¶ 9; 86 P.3d 735). Brighton Title does not even attempt to articulate, in its appeal argument, what cognizable interest it has in opposing the award of attorney's fees against Deseret Sky. The district court issued no attorney fees award against Brighton Title. Brighton Title has no interest in, reason for, or right to object to an award of attorney fees not made against Brighton Title. The district court awarded attorney fees only as against Deseret Sky Development, and Deseret Sky Development approved the form of judgment and Ruling submitted to the Court, without objection.

Rule 17(a) of the Utah Rules of Civil Procedure provides that "[e]very action shall be prosecuted in the name of the real party in interest."[26] Cooper sought an award of attorney's fees against Deseret Sky for under the REPC on which it sued Deseret Sky. Cooper did not sue Brighton Title for an award of attorney's fees.[27] Accordingly, Cooper submits that Rule 17 can

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[26] Black's Law Dictionary (8th ed. 2004) defines real party in interest as "A person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome.

[27] The purpose of Rule 17(a) is to allow the defendant to a cause of action the right to have that cause of action prosecuted by the real party in interest so that the judgment will preclude any action on the same demand by another (See Green v. Louder, 29 P.3d 638, (Utah 2001)) and to permit that defendant to assert all defenses or counterclaims available against real owner of the

and must be construed to mean that Deseret Sky and only Deseret Sky can defend *itself* against Cooper's claim for attorney fees. Brighton Title cannot be permitted to defend a claim made solely against Deseret Sky. Given that Brighton Title is not a real party in interest to the question of the award of attorney's fees to Cooper, the appeals court need not reach the question of whether the district court award of attorney's fees is erroneous.[28] Because Brighton Title presents no evidence that it has a legally protectable interest in asserting Deseret Sky's potential defenses, the district court did not err in determining that Brighton Title lacks standing to appeal award of the attorney's fees against Deseret Sky. D.U. Co., Inc. v. Jenkins, ---- P.3d ----, ¶ 12 (Utah App. 2009) 2009 UT App 195.

IX. COOPER'S REPRESENTATION THAT IT HELD FEE TITLE TO THE PROPERTY THAT WAS THE SUBJECT OF THE REPC WAS NOT A BREACH OF THE REPC.

Brighton Title contends on appeal that Cooper misrepresented itself as the owner of the Real Property because Cooper did not hold legal title when the parties entered into the REPC. Defendant's contention is demonstrably erroneous. Even if any of Cooper's disclosures somehow constitute misrepresentations, Brighton Title cannot claim such as a defense to its breach of contract, nor claim breach of contract on the part of Cooper.

> [I]f the party to whom a misrepresentation has been made, after having ascertained the real facts of the case, and thus discovered the untruth of the statements, goes on acting in pursuance of the contract, . . . he thereby waives the benefit of the misrepresentations, and cannot allege them as a ground either for rescinding or resisting enforcement of the agreement. In other words, the party who has been misled is required, as soon as he learns the truth and discovers the falsity of the statements on which he relied, with all reasonable diligence to disaffirm the contract, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. The party deceived is not

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cause. (Shurtleff v. Jay Tuft and Co., 1980, 622 P.2d 1168 (Utah 1980)).

[28] Notwithstanding, Cooper complied with Rule 73, Utah Rules of Civil Procedure, and case law governing attorney's fee awards (See Affidavit of Attorney's fees and Costs (R 751-761)).

> allowed to go on deriving all possible benefit from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to execute.

Le Vine v. Whitehouse, 109 P. 2, 7, 37 Utah 260 (Utah 1910).

Accordingly, Brighton Title's defense, based upon Cooper's lack of title and/or Cooper's ostensible misrepresentation is without merit as a matter of law. By the same token, the Le Vine v. Whitehouse holding (and the Kenny v. Rich holding cited *infra*) dictates that Defendants cannot assert against Cooper a claim for breach of contract that Deseret Sky itself had, by its inaction, waived.

Despite Brighton Title: 1) having known, on May 31, 2007, that Cooper's interest in the property was not fee title (Gorringe Depo., Pg. 17, lines 12-24 (R 268)); and 2) having informed Deseret Sky the next day (June 1, 2007) that Cooper did not hold fee title to the Real Property (Gorringe Depo., Pg. 18, lines 10-12 (R 268)), Brighton Title nevertheless accepted the initial $100,000 earnest money from Deseret Sky in escrow, and did so in its capacity as an escrow agent.

Deseret Sky neither: 1) canceled the REPC by providing written notice to Seller; nor 2) delivered a written objection to Seller regarding the Buyer's Due Diligence by the June 8, 2007 Due Diligence Deadline. Paragraph 8.3 of the REPC prescribes the consequence of Deseret Sky's inaction:

> 8.3 Failure to Respond. If by the expiration of the Due Diligence Deadline, Buyer does not: (a) cancel this Contract as provided in Section 8.2; or (b) deliver a written objection to Seller regarding the Buyer's Due Diligence, *The Buyer's Due Diligence shall be deemed approved by Buyer; and the contingencies referenced in Sections 8(a) through 8(g), including but not limited to, any financing contingency, shall be deemed waived by Buyer.*

(Emphasis added.)

The guiding legal principles with respect to Deseret Sky's failure to timely cancel or object were recently discussed by the Utah Court of Appeals in Kenny v. Rich, 186 P.3d 989 (Utah App. 2008), 2008 UT App 209. The Court of Appeals stated:

> Where a party is contractually bound to follow certain procedures and timeline in order to invoke specified contractual rights, and the party fails to do so, the party waives his or her rights. *See* Brinton v. IHC Hosps., Inc., 973 P.2d 956, 966 (Utah 1998) ("[T]he trial court correctly required [the party] to timely assert each objection to purported . . . violations of the [contract], in compliance with his contractually assumed duty, or relinquish them [as waived]."); *see also* DCM Inv. Corp. v. Pinecrest Inv. Co., 34 P.3d 785 (Utah 2001) ("[Defendants] failure to choose either option [as required by the contract] resulted in waiver of its contractual right to select an option."); American Rural Cellular v. Systems Commc'n Corp., 939 P.2d 185, 193 (Utah App. 1997).

A waiver is the intentional relinquishment of a known right. In re Estate of Flake, 71 P.3d 589, 599 (Utah 2003) (citing Interwest Const. v. Palmer, 886 P.2d 92, 98 (Utah App.1994). "Waiver of a contractual right occurs when a party to a contract intentionally acts in a manner inconsistent with its contractual rights." "[The relinquishment] must be distinctly made, although it may be express or implied." *Id.* The procedures set out for cancellation or objection set forth in the REPC are clear and unequivocal. Deseret Sky had until June 8, 2007, to exercise its rights to object and/or cancel the REPC. Having failed to do so, Deseret Sky relinquished and waived its right to rescind the REPC. Deseret Sky—and by extension, Brighton Title—is barred from belatedly claiming a claim of breach against Cooper. Because Deseret Sky did not timely cancel or object to the transaction in accordance with the terms of the REPC, the earnest monies became non-refundable and payable to Cooper as liquidated damages.

Deseret Sky—and by extension, Brighton Title—waived any defense based on a theory of fraud or misrepresentation. Deseret Sky waived any right to rescind based on a theory of fraud. As of the June 8, 2007 Due Diligence Deadline Deseret Sky had neither canceled the REPC by providing written notice to Seller nor delivered a written objection to Seller regarding

the Buyer's Due Diligence. Nevertheless, for more than a month and a half after the Diligence Deadline, Deseret Sky continued to communicate with Cooper in the hope it might still consummate a sale of the Real Property. At no time during continued contact and discussions did Deseret Sky either assert to Cooper that it was defrauded or that it claimed a right of cancellation based upon any misrepresentation.

> It is well settled by decisions from [the Utah Supreme Court] court that a person claiming the right to rescind a contract because of misrepresentations or fraud, must, after discovery of the fraud, announce his purpose [to rescind] and adhere to it. Frailey v. McGarry, 211 P.2d 840, 844 (Utah 1949) (citing Taylor v. Moore, 87 Utah 493, 51 P.2d 222 (Utah 1935)).

Brighton Title can cannot claim on the one hand that Deseret Sky was defrauded, yet also claim—having discovered the ostensible misrepresentation—that Deseret Sky could continue under such circumstances to pursue an interest in the REPC. If it considered itself defrauded, Deseret Sky's right was to cancel or object. Deseret Sky did neither. Deseret Sky—and by extension, Brighton Title—cannot now belatedly assert fraud or misrepresentation as a defense.

X. COOPER DID NOT HAVE TO BE IN TITLE DURING THE EXECUTORY PERIOD FOR THE REPC TO BE BINDING UPON THE OTHER PARTICIPANTS IN THE TRANSACTION.

Prior to the parties entering into the REPC, Cooper was under contract with W.H. Hansen Investments, LC to purchase the Real Property and, therefore, held equitable title to the Real Property. Significantly, Deseret Sky was on notice of this fact the day before the REPC was fully executed (and well before June 8, 2007, which date was Deseret Sky's Due Diligence Deadline).

Equitable title is, by definition, "a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title." (Black's Law Dictionary (8th ed. 2004).) Cooper thus held equitable title to the property at the time it entered into the REPC with

Deseret Sky. Cooper correctly claimed—and represented itself as holding—an ownership interest in the Real Property; moreover, Deseret Sky had actual notice of the nature of Cooper's title before expiration of the Due Diligence Deadline.

This very issue was expressly addressed in the Utah Supreme Court case of Neves v. Wright, 638 P.2d 1195 (Utah, 1981). The Neves court held (at Pg. 1197) that a seller under a uniform real estate contract that represents itself as having title need not have marketable title until final payment is made or tendered. The Neves court further observed, *inter alia*:

> [As early as 1909, in Foxley v. Rich, 35 Utah 162, 99 P. 666 (Utah 1909) the Utah Supreme Court] established the fundamental rule that a seller need not have legal title during the entire executory period of a real estate contract.

Neves v. Wright, 638 P.2d at 1197.

> In Owens v. Neymeyer, 62 Utah 580, 221 P. 160 (Utah 1923), the seller, at the time the contract was entered into, did not have legal title to the land. His cousin, who had a claim against the land for $1,277.75 as part of the seller's purchase price, held legal title. About the time an action was commenced by the buyer, the seller's cousin conveyed legal title to the seller, enabling him to convey good title prior to the time established in the contract. The Court held that the purchaser was not entitled to rescission and recovery of the purchase price.

Id. at 1198 (citing Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417 (Utah 1973); Woodard v. Allen, 1 Utah 2d 220, 265 P.2d 398 (1953)).

The court in Neves v. Wright continued:

> This Court reiterated the basic principle in Leavitt v. Blohm, 11 Utah 2d 220, 223, 357 P.2d 190, 192-93 (1960):
>
> > [T]he vendor in a real estate contract is generally not obliged to have full and clear marketable title at all times during the pendency of his contract of sale because, ordinarily, title need not be conveyed until the final payment is made or tendered; and we further agree that the purchaser cannot use a claimed deficiency in title as an excuse for refusing to keep a commitment to purchase property, as was attempted in the case of Woodard v. Allen, (1 Utah 2d 220, 265 P.2d 398 (Utah 1953).) (Footnotes omitted.)

The Neves v. Wright court went on further to explain:

> The rule that a seller of real estate need not have title at all times during the executory period of a contract, is not designed to favor sellers over buyers; rather, the purpose is to enhance the alienability of real estate by providing necessary flexibility in real estate transactions.
>
> * * *
>
> The basic test in determining whether a buyer can rescind is whether the defect, by its nature, is one that can be removed, as a practical matter, as distinguished from defects which, by their nature, cannot be removed by the seller as a practical matter. Davis v. Dean Vincent Inc., 255 Or. 233, 465 P.2d 702 (1970).

Id. at 1199.

Deseret Sky was fully advised of Cooper's interest in the Real Property during the Diligence Period and still did not cancel or object as allowed by the REPC. Deseret Sky was provided a title commitment showing Cooper as purchaser, and also was given a copy of the Hansen Contract.[29] Well before the expiration of the Diligence Period, Deseret Sky knew that title would pass from W. H. Hansen to Cooper, and then to Deseret Sky.

CONCLUSION

Even with all undisputed facts and inferences cast in the light most favorable to Brighton Title, There is no genuine issue as to any material fact. Brighton Title's defenses are patently contrary to plain, established law, and are without merit. Cooper was entitled to summary judgment as a matter of law (Allred ex rel. Jensen v. Allred, 182 P.3d 337 (Utah 2008) (*citing* Rule 56(c), Utah R. Civ. P.). The district court judgment must be affirmed.

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[29]On or about May 27, 2007, Angela Gowans received from Cooper Enterprises a conditional use application, preliminary plat submittal which included all applications, title, and geotechnical information, drawings and engineering information, along with the Cottonwood Heights Preliminary Approval, Application Acceptance Letter, Fencing Proposal, Permit Report, correspondence with Cottonwood Heights City, sellers disclosures, and minutes from the Cottonwood Heights Improvement District pertaining to the Danish Heights project (R 231).

STATEMENT OF NO ADDENDUM

No addendum is necessary under Rule 24 (a)(11) of the Utah Rules of Appellate Procedure.

DATED and signed this 31 day of July, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2009, I caused to be hand-delivered two true and correct copies of the foregoing Brief of Appellee to:

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